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Brief of Whitecotton for P. E.

Filed Jan. 25, 1898.

Supreme Court of the United States.

October Term, 1897.

No. 553.

LARS THOMPSON,
Plaintiff in Error.
vs.
THE STATE OF UTAH,

In Error to the Supreme Court of the State of Utah.

Plaintiff's Brief.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

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J. C. GRAHAM, JR., PRINTER, PROVO.

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I. STATEMENT OF CASE.

The plaintiff in error and one Jack Moore were indicted in the Second District Court of the Territory of Utah, in the month of May, 1895, and by the indictment charged with the crime of grand larceny, alleged to have been committed in the month of March, 1895, at Wayne County, Territory of Utah. (See indictment, page 1 of Record.)

On the 21st day of November, 1895, the plaintiff and the other defendant were tried by a jury of twelve persons, and convicted as charged in the indictment. (Record, page 1.)

The verdict of the jury was set aside by the trial Court.

(Page 2 of Record.) and when Utah Territory was admitted into the Union as a State, this cause was transferred to Wayne County, and from Wayne County a change of venue was taken to Emery County, where the case was again tried against the defendant Lars Thompson, plaintiff herein, on the 26th day of May, 1897, by a jury consisting of only eight persons, and a verdict of guilty of grand larceny, as charged in the indictment, was returned. (Page 3 of Record.)

The defendant was then called for sentence, and when asked if he had any legal excuse to show, why he should not receive the sentence and judgment of the Court, by his counsel moved the Court to vacate and set aside the verdict of the jury, and to grant a new trial of the cause, for the reason, among other things,

That the defendant had not had a trial by a jury, as provided by law, and more particularly because –

First: At the time the alleged offense is charged to have been committed, a lawful jury was composed of twelve jurors and no less number.

Second: That at the time the indictment was found and returned by the grand jury a trial jury was composed by law of twelve jurors and no less number.

Third: The pretended jury by which the defendant was tried, on May 26th, 1897, consisted of eight persons only. (Pages 3 and 4 of Record.)

This motion was over-ruled by the Court, and judgment pronounced upon him, that he be imprisoned in the State prison of the State of Utah, for the term of three years. (Page 5 of Record.)

On the 4th day of June, 1897, the trial Judge settled a bill of exceptions (Pages 5 and 6 of Record) and thereupon and upon the record in the case, the defendant appealed from the judgment of the trial Court to the Supreme Court of the State of Utah.

In the State Supreme Court the appellant claimed that Section 10 of Article I. of the Constitution of the State of Utah, providing that, except in capital cases, a trial jury shall consist of eight jurors, is, as to offenses committed before statehood in Utah, and particularly as to his offense, *ex post facto*, and void, and in contravention of Section 10, Article I. of the Constitution of the United States.

By a decision rendered in said cause on the 27th day of September, 1897, the State Supreme Court over-ruled said contention, and sustained the validity of the judgment against the appellant there, plaintiff here, and sustained the validity of the said State constitutional provison reducing a trial jury from twelve to eight persons in cases of felony arising under Territorial government.

It is to review this judgment, that this writ of error is brought.

II. ERRORS RELIED ON FOR REVERSAL.

1. The State Supreme Court erred in upholding the validity of *Section 10* of Article I. of the Constitution of the State of Utah, providing that a jury for the trial of felonies alleged to have been committed while Utah was a Territory and before said State Constitution and laws had any existence should be composed of eight persons only in cases not capital.

2. The said Court erred in deciding that said State Constitution and laws are not *ex post facto* and not in contravention of Subdivision 1 of Section 10, of Article I. of the Constitution of the United States, with reference to offenses committed while Utah was a Territory, and a trial jury consisted of twelve jurors and no less number.

3. The said Court erred in deciding that the judgment against the plaintiff herein was by due process of law.

4. The said Court erred in affirming the judgment of the

trial Court in said cause for each and all the reasons above set forth, and for the further reason that the plaintiff has not been tried by a jury at all.

III. POINTS OF LAW.

1. *Section* 3065, II Compiled Laws of Utah, 1888, reads as follows: "A trial jury in a District Court consists of twelve, and in the Justice's Courts of six men, unless the parties to the action or proceeding, in other than criminal cases, agree upon a less number."

Section 4790, II C. L. U., 1888: "No person can be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the Court, or upon a plea of guilty, or upon judgment against him upon a demurrer in the case mentioned in Section 199, or upon a judgment of a Court, a jury having been waived in a criminal action not amounting to a felony."

Section 4997, II C. L. U. 1888: "Issues of fact must be tried by jury, unless a trial by jury be waived in criminal cases not amounting to a felony by the consent of both parties expressed in open Court and entered in its minutes."

Section 4380, II C. L. U., 1888: "A felony is a crime which is, or may be, punishable with death, or by imprisonment in the penitentiary. Every other crime is a misdemeanor."

Section 4643, II C. L. U., 1888: "Grand larceny is larceny committed in either of the following cases: * * * * 3. When the property taken is a horse, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, mule, jack, or jenny."

Section 4644, II C. L. U., 1888: "Grand larceny is punishable by imprisonment in the penitentiary for not less than one nor more than ten years."

All the sections above set forth, so far as they relate to

criminal causes, were in full force and effect until January 6th, 1896, when the State Constitution and government became effective

Under these statutes the plaintiff in error was indicted in May, 1895, and tried in November, 1895, by a jury of twelve men and the verdict was set aside by the Court.

2. Section 10 of Article I, of the Constitution of Utah, reads as follows: "In capital cases the right of trial by jury shall remain inviolate. In Courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. * * * "

Under this provision of the Constitution, there being no legislation thereon, the plaintiff in error was tried by a pretended jury of eight persons, and upon their verdict of guilty he was sentenced to three years in the State prison.

3. By Subdivision 1 of Section 10 of Article I, of the Constitution of the United States, "No state shall * * * pass any * * * *ex post facto* law. * * "

By the sections of the Compiled laws of Utah, 1888, above quoted, all of which were law at the time the offense charged against the plaintiff, was committed, if committed at all, there was no way, by which he could be punished for the act charged, until after a jury of twelve men had unanimously agreed upon a verdict of guilty, unless he should plead guilty.

In cases amounting to felony, the accused was not permitted to waive a jury trial, and in the case of the Territory of Montana vs. Ah Wah, reported in I Pacific Reporter page 732, the Supreme Court of Montana held that the defendant could not waive one juror and consent to be tried by eleven. His consent was held to be a nullity. No valid judgment could be pronounced upon such a verdict. The whole opinion is full of learning upon the subject at bar.

The State Supreme Court of Utah justifies its decision in this case by referring to the case of the State vs. Bates, 14 Utah, 293, where in passing upon the same question, they say at page 301, "If a jury of eight men is as likely to ascertain

the truth as twelve, that number secures the end. There can be no magic in the number twelve, though hallowed by time. Intelligence, impartiality, and integrity, are the qualities that will enable and influence jurors to ascertain and declare the truth. Such result does not depend upon any particular number." Why would not that language apply equally to three men, or to one good man? If four of a jury of twelve can be lawfully taken away, why not eight, or eleven? Surely if the State can take away any part o. the jury as it existed at the time the offense was committed, it can take away any other part, or the whole.

And that would seem to be the logical test of the soundness of the contention of the State. Can it take away the right to a jury trial for an offense, which, under the law in force at the time it was committed, could be punished only upon conviction by the unanimous verdict of a jury of twelve men?

The Supreme Court of Utah says in the opinion above quoted from, that the number of jurors that shall try a man charged with crime is only a matter of *procedure*. A *mere* formal ceremony, a shadow, in which the accused can have no substantial or abiding right, they may as well have said. Judging from this decision alone, one would be beguiled into forgetting that the English speaking people have always been ready to meet their kings on the field of battle to maintain this sacred right as the palladium of their liberties, and the strongest bulwark that has ever stood between the citizen and the arbitrary rule of tyrants.

The *personnel* of the Court, when this decision was rendered, was about the same as when the Supreme Court of the Territory of Utah decided the case of the American Publishing Co. vs. Fisher, which came to this Court on a writ of error to the Territorial Supreme Court. The Territorial Supreme Court held in that case that a verdict by nine jurors out of twelve was valid, but this Court took a different view of the matter, as appears in American Publishing Co. vs. Fisher, 166 U. S. 464,

and other cases decided at the same term. The Utah Court held, in that case, 10 Utah, 147,—that it was mere procedure—not a matter of *substantial* right, but something that could any time be blown away by the breath of a legislature.

The plaintiff in error contends, that he was entitled to be tried by a jury of twelve men, because, at the time the offense is charged to have been committed, he could not be punished without being first convicted by such a jury. It stood before him as a shield, which no power can lawfully take away. If changing the number of a jury were only changing the procedure, and not tampering with substantial rights, it would have been competent for the Territorial Legislature to change it, which it has been repeatedly held by this Court they could not do. The Territorial legislature could not have taken away four of his jury. Why? Because it was a substantial right.

Am. Pub. Co. vs. Fisher, 166 U. S. 464.

Then, for the same reason, the State cannot do it.

McCarty vs. State, 25 Pac. Rep. 299.

Kring vs. Missouri, 107 U. S. 221.

In the latter case, at page 232, Mr. Justice Miller, speaking for the Court, and discussing what is procedure, says: "*Can the law with regard to bail, to indictments, to grand jurors, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offence was committed, and such legislation not held to be ex post facto because it relates to procedure, as it does, according to Mr. Bishop?*

"*And can any substantial right, which the law gave the defendant at the time to which his guilt relates be taken away from him by ex post facto legislation, because in the use of a modern phrase, it is called a law of procedure? We think it cannot.*"

So far as this case is concerned, we do not question the power of the State to fix the number of trial jurors at eight or any other number to try cases arising after the law is fixed.

We object to being tried by a law that was enacted after the commission of the offense, which places us in a less favorable situation, than we were in when the offense was committed.

Medley, Petitioner, 134 U. S. 160.

The plaintiff in error respectfully submits, that the judgment of the Supreme Court of Utah ought to be reversed.

J. W. N. WHITECOTTON,

Attorney for Plaintiff in Error.